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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No. 148

N. N. S. MATCOVICH,
Petitioner,

vs.

CLIFFORD C. ANGLIM, as Collector of Internal Revenue for the First District of California,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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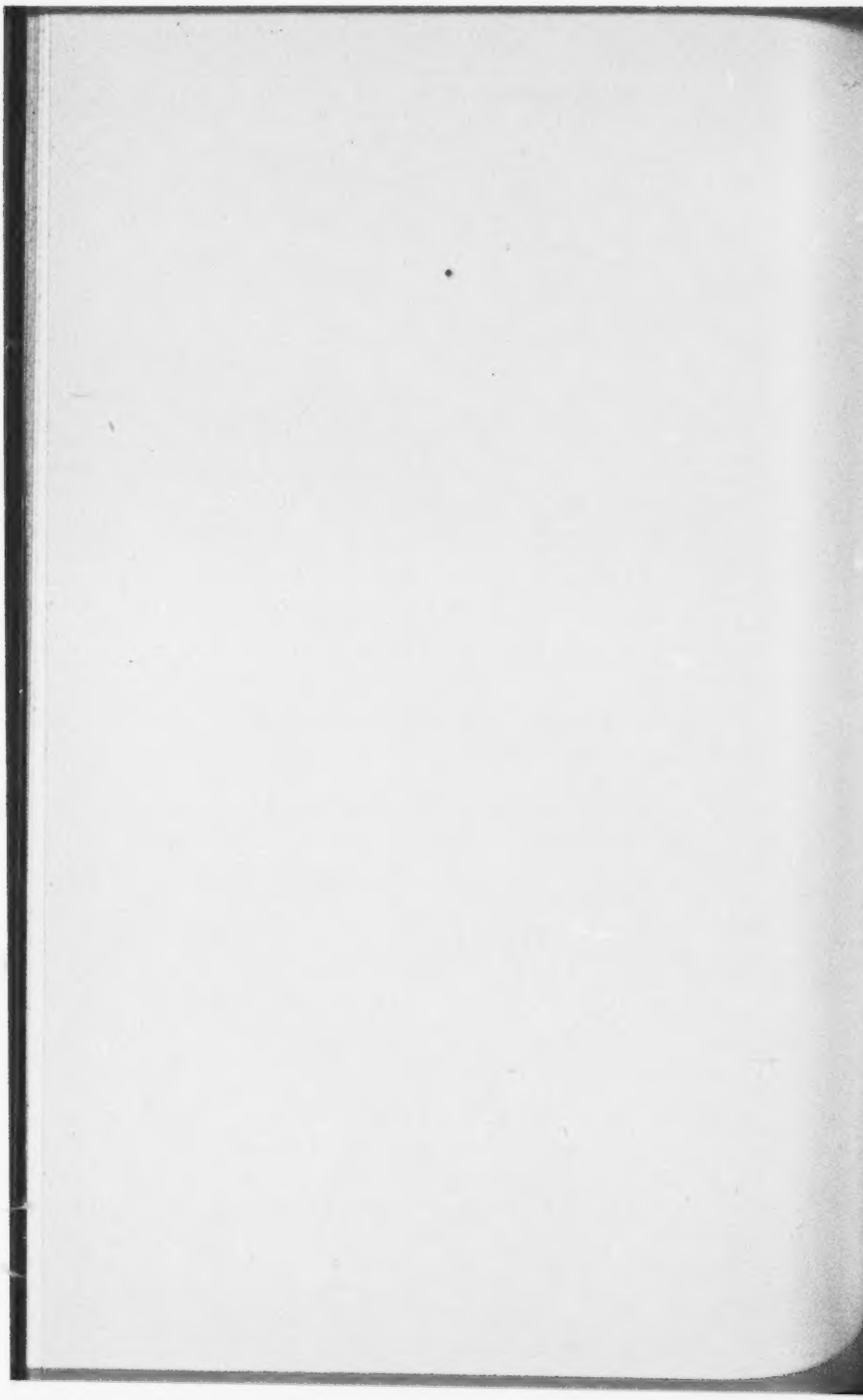

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(1) The Ninth Circuit of the Court of Appeals differs in the construction of the rule laid down in Griffith v. Commissioner, 308 U. S. 355-358 from that of the Fifth Circuit in the case of Commissioner v. Falcon Co., 127 Fed. (2d) 277, in that the Fifth Circuit holds the rule only applies when an issue of fraud or subterfuge has been raised. If the construction given by the Fifth Circuit is correct then the judgment here should be reversed	10
(2) The Circuit Court erred in holding that the state law was not controlling since it held that the relationship of employer and employee should be established under the common law while we find there is little if any difference between the common law and the state law, and further the case of Childers v. Commissioner, supra, held that the California law should be applied where the same issue was raised between California citizens	13
(3) Since this license agreement was made between citizens of California and in the State of California, it should have been construed under the laws of the State of California and as thus construed, it was conclusive on the origin and existence of the relationship between appellant and said women	15
Conclusion	16

Table of Authorities Cited

Cases

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PETITION FOR WRIT OF CERTIORARI
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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY OF STATEMENT OF MATTERS INVOLVED.

Action was brought to recover two thousand four hundred twenty-six dollars and twenty-five cents

($2426.25) paid by petitioner to respondent for taxes alleged to have been due under Title XI of the Social Security Act. After payment was made and claim for refund denied, action was instituted. Petitioner claims that the relation of employer and employee did not exist and hence, the Social Security Act was not applicable.

The complaint alleges that plaintiff licensed the women in question to use his premises for the purpose of dancing. (R. 3.) Respondent by his answer raised the sole issue that the relationship between petitioner and said ladies was that of employer and employee. (R. 22.) No issue of fraud or charge that petitioner formulated a scheme to evade the tax in question was involved. Upon a trial of the action, judgment was entered in favor of respondent. (R. 28.) From this judgment an appeal was taken to the Circuit Court of Appeals (Ninth Circuit). (R. 32.) The judgment was affirmed by that Court. (R. 145.) In affirming the judgment, the Circuit Court predicated its opinion upon the case of *Griffith v. Commissioner,* 308 U. S. 355-358, which we claim is not applicable because no issue of fraud or scheme to evade the tax was involved. (R. 144.) That it is not applicable is pointed out in the case *Commissioner v. Falcon Co.,* 127 Fed. (2d) 277 (Fifth Circuit), and by the minority opinion in *Campana Corporation v. Harrison,* 114 Fed. (2d) 400 (Seventh Circuit).

The Circuit Court holds that the case of *Griffith v. Commissioner,* supra, disposes of the license agreement which establishes the relationship between the

parties, even though no issue of fraud is made or that the license agreement was entered into for the purpose of avoiding the tax, which holding is contrary to that of the Fifth Circuit. (R. 144.)

The Circuit Court further stated that if the state law should be applied by virtue of a State Court decision, the judgment would have to be reversed, but concluded, "the State Law is not controlling". (R. 143.) However, according to its own decision, there is no difference between the state law and the federal law on the question as to what constitutes the relationship of employer and employee.

JURISDICTION.

The date of the judgment of the Circuit Court of Appeals to be reviewed is March 30, 1943, which is reported in 134 Fed. (2d) 834. Within time (Rule 25, Rules of the United States Circuit Court of Appeals for the Ninth Circuit) petitioner applied for a rehearing before the said Circuit Court of Appeals which was denied on May 22, 1943. (R. 146.) The judgment sought to be reviewed thus became final. The statutory provisions under which jurisdiction of this Court is invoked is the Judicial Code, Section 240 (a) amended, 28 U. S. C. A. Section 347. The cases believed to sustain the jurisdiction to review decisions of the Circuit Court of Appeals are:

Forsyth v. Hammond, 166 U. S. 506-512;

Hamilton, etc. v. Wolf Bros. & Co., 240 U. S. 251-258.

THE QUESTIONS PRESENTED.

The principal questions involved are as follows:

1. Whether the rule announced in *Griffith v. Commissioner,* 308 U. S. 355-358, should be limited to those cases in which an issue of fraud has been raised, or an issue that a scheme was created to evade a tax is involved, or should be applied generally.

2. Whether the federal law for establishing the relationship of employer and employee is different from the state law.

3. Whether or not a license agreement made in the State of California should be construed according to the laws of the State of California.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals for the Ninth Circuit by its opinion in this case has reached a conclusion that conflicts with the decision reached by the Fifth Circuit in the case, *Commissioner v. Falcon Co.,* 127 Fed. (2d) 277, and is contrary to the rule as announced by the minority opinion in the case, *Campana Corporation v. Harrison,* 114 Fed. (2d) 400-412 (Seventh Circuit).

2. That the right to contract for the purpose of establishing the relationship of employer and an independent contractor is abridged by the Circuit Court. The Circuit Court opinion is contrary to the holding

in *Reeves v. Howard Refining Company,* 33 Fed. Supp. 90, and *Gregory v. Helvering,* 293 U. S. 465 (55 S. Ct. 266, 79 L. Ed. ..... If the opinion of the Circuit Court is permitted to stand no one will be able to enter into a contract creating the relationship of an independent contractor or a license agreement where a taxing agency is involved. The Circuit Court should have construed the license agreement under the laws of the State of California as it was executed in California, and as thus construed should have held that the controls referred to in its opinion could properly be exerted through the license agreement.

BRIEF.

Brief in support of petition for writ of certiorari.

PRAYER.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Honorable Court on a day certain to be therein designated a full and complete transcript of the record and all proceedings in said case numbered and entitled in said Court No. 10,306, N. N. S. Matcovich, appellant v. Clifford C. Anglim, as Collector of Internal Revenue for the First District of California, appellee, to the end that said case may be reviewed and determined by this Court as provided by

law and that said judgment of said United States Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem meet, just and proper.

Dated, Sacramento, California,
June 28, 1943.

HORACE B. WULFF,
Counsel for Petitioner.

R. H. SCHWAB,
Of Counsel.